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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

In re)	Bankruptcy Case
)	No. 01-30923DM
PACIFIC GAS & ELECTRIC COMPANY,)	
)	Chapter 11
Debtor.)	
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PEOPLE OF THE STATE OF CALIFORNIA,)	Adversary Proceeding
ET AL.,)	No. 02-3026DM
)	
Plaintiffs,)	
)	
v.)	
)	
PG&E CORPORATION; ET AL.,)	
)	
Defendants.)	
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CITY AND COUNTY OF SAN FRANCISCO,)	Adversary Proceeding
ET AL.,)	No. 02-3040DM
)	
Plaintiffs,)	
)	
v.)	
)	
PG&E CORPORATION, ET AL.,)	
)	
Defendants.)	
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CYNTHIA BEHR,)	Adversary Proceeding
)	No. 02-3042DM
)	
Plaintiff,)	
)	
v.)	Consolidated For
)	Motions To Remand and
)	Motions To Dismiss
PG&E CORPORATION, ET AL.,)	
)	
Defendants.)	
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MEMORANDUM DECISION ON MOTIONS TO REMAND

I. INTRODUCTION

On April 23, 2002, the court heard arguments on three motions

1 to remand to the state court three complaints filed against PG&E
2 Corporation ("Corporation")¹, and in two instances, against
3 several individuals who are directors of Corporation or of debtor,
4 Pacific Gas and Electric Company ("Debtor"). After considering
5 the motions, the oppositions, including Debtor's Position
6 Regarding Motions To Remand and The Automatic Stay, and the
7 arguments of counsel, the court will remand portions of all three
8 removed actions, for the reasons set forth below.

9 II. FACTS AND PROCEDURAL HISTORY²

10 On January 10, 2002, Bill Lockyer, Attorney General of the
11 State of California (the "AG"), filed a Complaint For Restitution,
12 Civil Penalties, Injunction, Appointment Of Receiver, And Other
13 Equitable And Ancillary Relief (the "AG Complaint") in the
14 Superior Court of the State of California for the County of San
15 Francisco (People of the State of California, ex rel. Bill
16 Lockyer, Attorney General of the State of California v. PG&E
17 Corporation, et al.; Case No. CGC-02-403289; Adversary Proceeding
18 No. 02-3026) (the "AG Action"). On February 2, 2002, Corporation
19 removed the AG Action to this court by filing its Notice Of
20 Removal Of Action.

21 On February 11, 2002, the City and County of San Francisco
22 ("CCSF") and the People of the State of California, by and through
23 San Francisco City Attorney Dennis J. Herrera, filed a Complaint
24

25 ¹ Corporation is not a debtor in this court; rather,
26 Corporation is the parent corporation of the debtor.

27 ² For purposes of the court's consideration of the three
28 motions to remand, all of the allegations of all three complaints
are deemed to be true.

1 For Restitution, Civil Penalties, Injunction, Appointment Of
2 Receiver, And Other Ancillary Relief (Conversion; Unjust
3 Enrichment; Cal. Bus. & Prof. Code § 17200 - Unlawful, Unfair &
4 Fraudulent Business Practices) in the Superior Court of the State
5 of California for the County of San Francisco (the "CCSF
6 Complaint") (City and County of San Francisco; People of the State
7 of California v. PG&E Corporation; Does 1-150; Case No. CGC-02-
8 404453; Adversary Proceeding No. 02-3040) (the "CCSF Action"). On
9 March 4, 2002, Corporation removed the CCSF Action to this court
10 by filing its Notice Of Removal Of Action.

11 On February 14, 2002, Cynthia Behr ("Behr") filed a Complaint
12 For Recovery Of Claim, Set Aside Fraudulent Transfer, Conspiracy,
13 Attachment, And/Or Levy Executed Against Assets, Damages,
14 Restitution, Injunction, Appointment Of Receiver, And Other And
15 Equitable And Ancillary Relief (Cal. Bus. & Prof. Code § 17200 -
16 Unlawful, Unfair & Fraudulent Business Practices; Cal. Civ. Code
17 § 3439 - Uniform Fraudulent Transfer Act; Cal. Comm. Code § 6107 -
18 Sales Act) (the "Behr Complaint") in the Superior Court of the
19 State of California in and for the County of Santa Clara (Cynthia
20 Behr v. PG&E Corporation, et al.; Case No. CV-805274; Adversary
21 Proceeding No. 02-3042) (the "Behr Action"). On March 8, 2002,
22 Corporation removed the Behr Action to this court by filing its
23 Notice Of Removal Of Action.³

24 Despite its lengthy title, the AG Complaint purports to

25
26 ³ Corporation should have removed the Behr Action to the San
27 Jose Division of this court. Fed. R. Bankr. P. 9027(a)(1). It is
28 highly likely that removal to that division would have resulted in
an intra-district transfer to this division. In any event, Behr
did not object to the removal directly to this division and the
court thus considers the issue waived.

1 assert one cause of action, viz. violation of the Unfair
2 Competition Act, section 17200 of the California Business and
3 Professions Code ("Section"). For the most part the AG Complaint
4 alleges numerous events that occurred prior to April 6, 2001 (the
5 "Petition Date"), the date the Debtor commenced its present
6 Chapter 11 case in this court. Reducing a complex history and
7 dozens of allegations to the simplest, the thrust of the Section
8 17200 theory is that Corporation has engaged in a series of events
9 amounting to unlawful, unfair and fraudulent business acts or
10 practices including (1) agreeing to the so-called First Priority
11 Condition⁴ while never intending to abide by it and other
12 conditions; (2) subordinating the interests of Debtor and Debtor's
13 ratepayers to Corporation's own interest; (3) failing to disclose
14 to the California Public Utilities Commission (the "CPUC") its
15 true intentions during the so-called Holding Company Proceedings;⁵
16 (4) transferring ratepayer-funded assets from Debtor to
17 Corporation for the benefit of Corporation and its affiliates,
18 even while Debtor was experiencing financial distress, and without
19 intent to infuse capital into Debtor when it needed capital to
20 operate, in violation of the First Priority Condition and other

22 ⁴ The AG alleges that in order to obtain CPUC's approval of
23 Debtor's application to reorganize into a holding company
24 structure (see footnote 5 below), Corporation and its directors
25 agreed that they would give "first priority" to the capital needs
of Debtor as determined to be necessary and prudent to meet its
obligations to serve or operate Debtor in a prudent and efficient
manner. AG Complaint at ¶ 44(g).

26 ⁵ On October 20, 1995, Debtor filed an application with the
27 CPUC for approval to reorganize under a holding company structure.
28 It proposed to implement the restructuring through a reverse
triangular merger. As a result of the merger, Debtor would become
the wholly owned subsidiary of Corporation. AG Complaint at ¶ 37.

1 conditions; (5) appropriating over \$4 billion from revenues that
2 Debtor had received from high frozen rates paid by ratepayers; (6)
3 implementing "ring-fencing" transactions to protect the assets of
4 other affiliates of Corporation from bankruptcy or credit down-
5 grading, insuring that it would be impossible for Debtor to access
6 such excess and impairing Corporation's ability to provide cash to
7 Debtor, again in violation of the First Priority Condition. While
8 the allegations go beyond those summarized by the court, for
9 convenience they will be referred to herein as the "First Priority
10 Claims."

11 The AG Complaint also alleges some events that occurred after
12 the Petition Date. It alleges that Corporation is co-proponent of
13 a Plan of Reorganization (the "Plan") in this court whereby Debtor
14 will transfer assets of its electricity transmission business, its
15 gas transmission business and its electricity generation business
16 to entities outside of the control of the CPUC. It charges
17 Corporation with utilizing the Plan (1) to restructure Debtor's
18 operations without CPUC approval; (2) to remove those current
19 operations and activities from the CPUC's jurisdiction; (3) to
20 transfer hydro-electric generation assets for an amount far below
21 their fair market value, without any revenue sharing mechanism
22 which would entitle ratepayers to any credit for profits realized
23 in violation of California law; (4) to burden Debtor with many of
24 the liabilities with which it entered bankruptcy; (5) to change
25 the ownership structure of Debtor without CPUC approval; (6) to

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1 evade compliance with the CPUC's Affiliates Rules;⁶ (7) to prohibit
2 CPUC and the State of California from taking action related to the
3 allocation or other treatment of "gain on sale" related to assets
4 transferred or disposed under the Plan, and (8) to prohibit Debtor
5 from reassuming the "net open position" of its customers unless
6 certain conditions are met. More specifically, the AG Complaint
7 alleges that Corporation's use of Debtor's Chapter 11 bankruptcy
8 to approve restructuring transactions and transfer assets is
9 "unfair" (AG Complaint, ¶ 105); that through Debtor's Chapter 11
10 bankruptcy case, Corporation and the other individual defendants
11 are "... continuing to engage in unlawful, unfair and fraudulent
12 business practices ..." (AG Complaint, ¶ 113); and that
13 "[Corporation's and the individual defendants'] continuing
14 wrongful conduct ... will further cause great and irreparable harm
15 to ratepayers." (AG Complaint, ¶ 115.) While the allegations go
16 beyond those summarized by the court, for convenience they will be
17 referred to herein as the "Plan Claims."

18 The CCSF Complaint sets forth three separate causes of
19 action. The first alleges conversion, the second alleges unjust
20 enrichment, and the third alleges violation of Section 17200. The
21 factual allegations are similar to, but nowhere near as
22 comprehensive as, those in the AG Complaint. For purposes of this
23 Memorandum Decision, CCSF's Section 17200 claims are also
24 identified as "First Priority Claims." They do not allege any
25 events after the Petition Date.

26
27 ⁶ In Decision D-97-12-088, the CPUC adopted affiliate
28 transaction rules governing the relationship between California's
energy utilities and their affiliates. AG Complaint at ¶ 46.

1 The conversion claim is somewhat confusing. CCSF alleges
2 that "Corporation took at least \$5.2 billion from [Debtor] between
3 1997 and 2000" and that, as a result, Debtor requested and was
4 granted rate increases to cover shortfalls. CCSF Complaint, ¶ 43
5 (emphasis added). The CCSF Complaint thus concedes that the
6 purportedly converted funds were owned and possessed by Debtor at
7 the time of the alleged conversions. The CCSF Complaint does not
8 allege that CCSF, citizens of San Francisco or of California, or
9 Debtor's ratepayers (as opposed to Debtor) owned or had an
10 immediate right of possession to the money at the time of the
11 alleged conversion.

12 The unjust enrichment claim of CCSF also alleges that
13 Corporation unlawfully took money from Debtor, leaving it with
14 insufficient money to provide safe and reliable electric service.
15 This resulted in CCSF and ratepayers being forced to advance
16 additional money to Debtor in the form of rate increases. In
17 order to avoid Corporation's unjust enrichment, CCSF asks for the
18 imposition of a constructive trust upon money wrongfully taken by
19 Corporation. Regardless of the different drafting approach, this
20 claim resembles the conversion claim. It does not allege anyone
21 other than Debtor owned the allegedly wrongfully withdrawn money.

22 The Behr Complaint appears to be almost a verbatim
23 duplication of the AG Complaint, although it states four causes of
24 action: (1) a claim under Section 17200; (2) a claim under Cal.
25 Civ. Code § 3439, the Uniform Fraudulent Transfer Act ("Fraudulent
26 Transfer Claim"); (3) a claim of conspiracy; and (4) a claim under
27 California Commercial Code § 6107, the California Bulk Sales Law
28 ("Bulk Sales Claim"). As to the last three causes of action, no

1 new facts have been pleaded. With respect to Behr's Section 17200
2 claims, those based on pre-petition conduct are also identified as
3 "First Priority Claims" and those based on post-petition, Plan-
4 related conduct are identified as "Plan Claims".

5 On March 1, 2002, the AG moved to remand the AG Action to
6 Superior Court; in the alternative he moved for abstention. On
7 March 22, 2002, CCSF made a similar motion; on April 1, 2002, Behr
8 made a similar motion. Corporation opposed all three motions to
9 remand and filed motions to dismiss the three complaints under
10 Fed. R. Civ. P. 12(b)(6), or in the alternative, sought a stay of
11 the respective actions until the Effective Date of Debtor's Plan.
12 Rather than consider those motions to dismiss, the court directed
13 the parties to respond to the motions to remand. The court
14 deferred action on the motions to dismiss until resolution of the
15 motions to remand.

16 III. ISSUES

- 17 A. Does sovereign immunity prevent the AG Action and the
18 CCSF Action from being removed to the bankruptcy court?
- 19 B. Do the portions of the AG Action and the Behr Action
20 raising the Plan Claims fall within the exclusive
21 jurisdiction of the bankruptcy court?
- 22 C. Are the First Priority Claims asserted in the AG Action
23 and the CCSF Action exempt from removal under 28 U.S.C.
24 § 1452(a) ("Section 1452(a)")?
- 25 D. Should Behr's First priority Claims be equitably
26 remanded under 28 U.S.C. § 1452(b) ("Section 1452(b)")?
- 27 E. May Behr prosecute her Fraudulent Transfer Claim and her
28 Bulk Sales Claim in state court?

1 F. May CCSF prosecute its conversion claim in state court?

2 IV. DISCUSSION

3 A. Sovereign Immunity Is Inapplicable

4 Citing People v. Steelcase, Inc., 792 F.Supp. 84, 86 (C.D.
5 Cal. 1992), AG and CCSF argue that the Eleventh Amendment bars
6 removal of the actions initiated by each of them. The court
7 disagrees. Steelcase is inconsistent with the weight of
8 authority, including that of the Supreme Court and the Northern
9 District of California,⁷ and has been rejected in many subsequent
10 decisions from other courts. See In re Rezulin Products Liability
11 Litigation, 133 F.Supp.2d 272, 297 (S.D.N.Y. 2001) ("the heavy
12 weight of authority holds that the Eleventh Amendment does not bar
13 removal"); Regents of the Univ. of Minn. v. Glaxo Wellcome, Inc.,
14 58 F.Supp.2d 1036, 1039 (D. Minn. 1999) (same, citing numerous
15 cases).⁸ This court believes that the reasoning of the majority of
16 the cases is more persuasive, and concludes that the Eleventh
17 Amendment does not preclude removal of the AG action or the CCSF

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19 ⁷ See Illinois v. City of Milwaukee, 406 U.S. 91, 100 (1972)
20 (where state is plaintiff in suit involving federal rights, "those
21 suits may be brought in or removed to the [federal] courts without
22 regard to the character of the parties"), citing Ames v. Kansas,
23 111 U.S. 449, 470 (1884). See also People v. Acme Fill Corp.,
24 1997 WL 685254 (N.D. Cal. 1997) (Walker, J.) ("California brought
25 suit against Acme of its own accord to recover civil penalties.
As a plaintiff, it cannot now assert immunity from suit under the
Eleventh Amendment."); cf. Lapidus v. Board of Regents of the
Univ. System of Ga., ___ U.S. ___, 122 S.Ct. 1640 (2002) (state's
removal of suit to federal court constituted waiver of its
Eleventh Amendment immunity).

26 ⁸ In criticizing the Steelcase decision, the Regents court
27 stated: "It is noteworthy that the court in Steelcase did not cite
28 any authority for this proposition, nor did it attempt to
distinguish the other cases, cited above, which found the Eleventh
Amendment was not a bar to removal of a state court action in
which a state was the plaintiff." 58 F.Supp.2d at 1040.

1 Action to the bankruptcy court.

2 B. Plan Claims are Preempted and Removable

3 In their respective complaints, AG and Behr allege that
4 Corporation has manipulated the bankruptcy process in a manner
5 constituting "unlawful, unfair and fraudulent business practices."
6 These allegations, which this court has identified as the "Plan
7 Claims," cannot be heard by the state court and thus will not be
8 remanded.

9 The Bankruptcy Code preempts virtually all claims relating to
10 alleged misconduct in the bankruptcy courts. See Holloway v.
11 Household Auto. Fin. Corp., 227 B.R. 501, 507 (N.D. Ill. 1998)
12 (finding claim under Illinois Consumer Fraud and Deceptive
13 Practices Act preempted by Bankruptcy Code), citing MSR
14 Exploration, Ltd. v. Meridian Oil, Inc., 74 F.3d 910 (9th Cir.
15 1996) (finding claim for malicious prosecution was preempted by
16 Bankruptcy Code).⁹ "The Bankruptcy Code provides a comprehensive
17 scheme reflecting a 'balance, completeness and structural
18 integrity that suggests remedial exclusivity.'" Shape, Inc., 135
19 B.R. at 708, quoting Periera, 92 B.R. at 908. "Since this federal
20 statute is applicable here, and has its own enforcement scheme and
21 separate adjudicative framework, it must supercede any state law
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24 ⁹ See also Gonzales v. Parks, 830 F.2d 1033 (9th Cir. 1987)
25 (malicious prosecution claim preempted by the Bankruptcy Code);
26 Pereira v. First N. Am. Nat'l Bank, 223 B.R. 28 (N.D. Ga. 1998)
27 (finding state law claims for an accounting and unjust enrichment
28 preempted by Bankruptcy Code); Brandt v. Swisstronics, Inc. (In re
Shape, Inc.), 135 B.R. 707, 708 (Bankr. D. Me. 1992) (Bankruptcy
Code preempts Massachusetts Consumer Protection Act with respect
to conduct arising out of or relating to the bankruptcy case).

1 remedies." Shape, Inc., 135 B.R. at 708.¹⁰

2 The Ninth Circuit recognized this proposition in MSR
3 Exploration, where it observed:

4 [A] mere browse through the complex, detailed, and
5 comprehensive provisions of the lengthy Bankruptcy Code
6 . . . demonstrates Congress's intent to create a whole
7 system under federal control which is designed to bring
8 together and adjust all the rights and duties of
9 creditors and embarrassed debtors alike. While it is
10 true that bankruptcy law makes reference to state law at
11 many points, the adjustment of rights and duties within
12 the bankruptcy process itself is uniquely and
13 exclusively federal.

14 MSR Exploration, 74 F.3d at 913-14 (emphasis added) (noting that
15 preemption with respect to state law remedies for bankruptcy
16 activities must be applied broadly; otherwise "the opportunities
17 for asserting malicious prosecution claims would only be limited
18 by the fertility of the pleader's mind and by the laws of the
19 state in which the proceeding took place.") (citations omitted).

20 AG and Behr have cited no reported decision in which a
21 creditor, government agency, or other party has attempted, by
22 resort to state court, to enjoin (or extract restitution or
23 damages from) a plan proponent for prosecuting a plan of
24 reorganization or any aspect thereof. Rather, courts (including
25 the Ninth Circuit) have held that similar collateral attacks on
26 bankruptcy proceedings and the bankruptcy process should not be
27 heard by state courts. For example, in Gonzales, the debtor

28 ¹⁰ In Shape, Inc., the debtor sued a creditor alleging that
various violations of the automatic stay constituted an unfair and
deceptive business practice. Id. The court noted that the
Bankruptcy Code contains the remedy for such violations and thus
"supercede[d]" the state law. Here, as in Shape, Inc., remedies
are provided under the Bankruptcy Code to any party who
successfully contests the ability of a debtor to reorganize or the
good faith of a plan proponent, including denial of confirmation.
See 11 U.S.C. §§ 1112(b) and 1129(a). Such remedies should be
pursued exclusively in this court.

1 (Gonzales) defaulted on an obligation prior to commencing his
2 chapter 11 case. See Gonzales, 830 F.2d at 1033. A creditor
3 (Parks) sought to foreclose a deed of trust she held on a house
4 owned by Gonzales. Id. Shortly before the scheduled state law
5 trustee sale, Gonzales filed a bankruptcy petition and the trustee
6 halted the sale. Id. Parks subsequently filed a statutory tort
7 action against Gonzales in California state court, claiming that
8 the bankruptcy filing constituted an abuse of process. Id. at
9 1033-34. Gonzales did not answer the complaint, and the state
10 court entered a default judgment against him. Id. at 1034.

11 Gonzales later filed an adversary proceeding in the
12 bankruptcy court against Parks, seeking relief from the state
13 court judgment. Id. The bankruptcy court granted Gonzales'
14 motion for summary judgment, declaring the state court judgment
15 void at its inception as violating the automatic stay. Id. The
16 bankruptcy court then vacated the state court judgment. Id. The
17 district court affirmed. Id.

18 On appeal to the Ninth Circuit, the court agreed with Parks
19 that the filing of the abuse of process claim did not necessarily
20 violate the automatic stay, as the automatic stay is "primarily
21 intended to apply to claims based on prior [i.e., prepetition]
22 debts and obligations[,]" and is "not applicable to debts or
23 obligations that accrue after the filing of the bankruptcy
24 petition." See id. at 1035. The court then noted that "the
25 effect the [automatic stay] would have on a theoretical third
26 category of debts and obligations, those that might accrue at the
27 moment of the filing or by virtue of the filing, is far from clear
28 - and that is the category involved in the case before us." Id.

1 Instead, the Ninth Circuit affirmed the bankruptcy court's
2 decision on other grounds: that is, state courts are without
3 subject matter jurisdiction to hear a claim that the filing of a
4 bankruptcy petition constitutes an abuse of process. See id.

5 In reaching its conclusion, the Ninth Circuit found:

6 Filings of bankruptcy petitions are a matter of
7 exclusive federal jurisdiction. State courts are not
8 authorized to determine whether a person's claim for
9 relief under federal law, in a federal court, and within
10 that court's exclusive jurisdiction, is an appropriate
11 one. Such an exercise of authority would be
12 inconsistent with and subvert the exclusive jurisdiction
13 of the federal courts by allowing state courts to create
14 their own standards as to when persons may properly seek
15 relief in cases Congress has specifically precluded
16 those courts from adjudicating. The ability
17 collaterally to attack bankruptcy petitions in the state
18 courts would also threaten the uniformity of federal
19 bankruptcy law, a uniformity required by the
20 Constitution.

13 * * *

14 That Congress' grant to the federal courts of exclusive
15 jurisdiction over bankruptcy petitions precludes
16 collateral attacks on such petitions in state courts is
17 supported by the fact that remedies have been made
18 available in the federal courts to creditors who believe
19 that a filing is frivolous. Debtors filing bankruptcy
20 petitions are subject to a requirement of good faith,
21 and violations of that requirement can result in the
22 imposition of sanctions. Congress' authorization of
23 certain sanctions for the filing of frivolous bankruptcy
24 petitions should be read as an implicit rejection of
25 other penalties . . . In any event, it is for Congress
26 and the federal courts, not the state courts, to decide
27 what incentives and penalties are appropriate for use in
28 connection with the bankruptcy process and when those
incentives or penalties shall be utilized.

22 Id. at 1035-36 (emphasis added) (citations omitted).¹¹

24 ¹¹ Cf. State Street Bank & Trust Co. v. Park (In re Si Yeon Park,
25 Ltd.), 198 B.R. 956, 962 (Bankr. C.D. Cal. 1996) (bankruptcy
26 trustee cannot be required to obtain permission from a state court
27 to file a bankruptcy adversary proceeding; giving state courts
28 veto power over federal actions would violate federal supremacy
and interfere with the administration of bankruptcy cases.
"Moreover, the bankruptcy court has exclusive jurisdiction to
determine whether a case or adversary proceeding has been
improperly filed in the bankruptcy court. The exercise of that

1 Of particular significance in Gonzales is the Ninth Circuit's
2 refusal to rely upon the automatic stay provisions of the
3 Bankruptcy Code in reaching its holding. Instead, the court
4 looked to the jurisdictional provisions of the Bankruptcy Code and
5 held that state courts simply are without power to act in
6 connection with those matters exclusively within the purview of
7 bankruptcy court jurisdiction. For the same reason the Gonzales
8 court also kept within the bankruptcy court the action against
9 Gonzales' attorney, who was not in bankruptcy.

10 Gonzales is analogous to the instant case.¹² Like the filing
11 of a bankruptcy petition generally, matters concerning
12 confirmation of a plan of reorganization in a chapter 11 case go
13 to the very essence of a bankruptcy court's "original and
14 exclusive jurisdiction of all cases under title 11" (see 28 U.S.C.
15 § 1334(a)), and, as a core proceeding under 28 U.S.C.
16 § 157(b)(2)(L), plan confirmation is within the protected sphere
17 of matters that the Ninth Circuit has held to be free from second-
18 guessing by state courts. See Gruntz v. County of Los Angeles (In
19 re Gruntz), 202 F.3d 1074, 1083 (9th Cir. 2000) ("[E]ven assuming
20 that the states had concurrent jurisdiction, their judgment would
21 have to defer to the plenary power vested in the federal courts
22 over bankruptcy proceedings. . . . The States cannot, in the

23
24 jurisdiction is particularly important when the matter involves
25 fundamental questions of bankruptcy law[.]").

26 ¹² Just as a creditor cannot prosecute an abuse of process claim
27 in state court against a bankruptcy debtor and his attorney for
28 seeking protection of the bankruptcy court, a creditor similarly
cannot sue a plan proponent in state court upon an allegation of
abusive use of the bankruptcy laws.

1 exercise of control over local laws and practice, vest State
2 courts with power to violate the supreme law of the land.") (cites
3 and internal quotation marks omitted).¹³ Other courts, both state
4 and federal, have reached the same conclusion. See, e.g., Saks v.
5 Parilla, Hubbard & Militzok, 67 Cal. App. 4th 567, 573-74 (1998)
6 ("Parties may not avail themselves of state court tort remedies to
7 circumvent federal remedies for their opponents' alleged misuse of
8 the bankruptcy process."); Idell v. Goodman, 224 Cal. App. 3d 262,
9 271 (1990) (finding that sanctions contained in Bankruptcy Code
10 preempted state action based on allegations that creditor filed
11 adversary proceeding in bad faith); Gene R. Smith Corp. v. Terry's
12 Tractor, Inc., 209 Cal. App. 3d 951, 954 (1989) (holding that
13 specific remedial provisions in Bankruptcy Code preempted debtor's
14 state action for abuse of process and malicious prosecution based
15 on creditors' allegedly malicious filing of involuntary bankruptcy
16 petition); see also Gonzales, 830 F.2d at 1036 ("A Congressional
17 grant of exclusive jurisdiction to federal courts includes the
18 implied power to protect that grant . . . A state court judgment
19 entered in a case that falls within the federal courts' exclusive
20 jurisdiction is subject to collateral attack in the federal
21 courts.") (citations omitted). Because the true gravamen of the
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23

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25 ¹³ See also Contractors' State License Board v. Dunbar, 245
26 F.3d 1058, 1063 (9th Cir. 2001) (to extent licensing board erred
27 in concluding that proceedings before it came within "police or
28 regulatory power" exception to the automatic stay in licensee's
Chapter 13 case, such administrative proceedings were void ab
initio, and bankruptcy court was under no obligation to extend
full faith and credit to board's determination).

1 Plan Claims are federal bankruptcy issues, these claims are pre-
2 empted and shall not be remanded.¹⁴

3 C. First Priority Claims Are Not Removable

4 Section 1452(a) provides that a "party may remove any claim
5 or cause of action in a civil action, other than a proceeding
6 before the United States Tax Court or a civil action by a
7 governmental unit to enforce such governmental unit's police or
8 regulatory power . . ." 28 U.S.C. § 1452(a) (emphasis added).
9 For the reasons stated below, the court concludes that the First
10 Priority Claims asserted by AG and CCSF constitute "police and
11 regulatory power" claims which are non-removable under Section
12 1452(a) and which are not exclusively "property of the estate."

13 AG and CCSF assert their First Priority Claims pursuant to
14 Section 17200. The California Supreme Court has determined that
15 an action for civil penalties and an injunction brought by a
16 governmental agency under Section 17200 "is fundamentally a law

17
18 ¹⁴ AG and CCSF contend that their respective actions must be
19 remanded because Section 1452(a) prohibits removal of "civil
20 actions by a governmental unit to enforce such governmental unit's
21 police or regulatory powers." As discussed later in this
22 memorandum decision, the First Priority Claims do constitute
23 claims for enforcement of the police and regulatory powers of the
24 AG and CCSF and are thus not removable. The Plan Claims asserted
25 by AG, on the other hand, are not police or regulatory claims and
26 are therefore subject to remand.

27 A police or regulatory action arises when a governmental body
28 enforces a statute, law or regulation which is effective whether
or not a bankruptcy exists and which is not preempted by
bankruptcy law. If, however, a governmental body is attempting to
claim that the bankruptcy process has been abused, such a claim
falls within the exclusive jurisdiction of the bankruptcy court.
Such claims relating to the plan or the plan process are not
subject to a state's police or regulatory power, but instead fall
within the bankruptcy court's authority to regulate activities
occurring in the context of a case pending before it. The AG's
Plan Claims are such claims and, consequently, Section 1452(a)
does not protect them from removal.

1 enforcement action designed to protect the public and not to
2 benefit private parties." People v. Pacific Land Research Co., 20
3 Cal.3d 10, 17, 141 Cal.Rptr. 20, 24 (1977); see also Massachusetts
4 v. First Alliance Mortg. Co. (In re First Alliance Mortg. Co.),
5 263 B.R. 99, 108 (9th Cir. BAP 2001) ("it is well-established that
6 consumer protection is a valid exercise of the police and
7 regulatory power . . ."). Therefore, the portions of the AG
8 Action and the CCSF Action¹⁵ asserting First Priority Claims¹⁶ are
9 "police or regulatory power" actions and cannot be removed. 28
10 U.S.C. § 1452(a).

11 Corporation asserts that the AG Action and the CCSF Action
12 are not police power actions because they would not satisfy the
13 "pecuniary purpose" and "public policy" tests established to
14 determine if an action is exempt from the automatic stay pursuant
15 to 11 U.S.C. § 362(b)(4). Section 362(b)(4) is inapplicable to
16 the issues before it. The court is not dealing with questions
17 about exceptions to the automatic stay found in 11 U.S.C.
18 § 352(b)(4). Rather, it must construe provisions in Section 1452
19 which describe what actions may not be removed. The pertinent
20 language of the two sections is nearly identical, but the cases
21 considering the pecuniary purpose and public policy issues have
22

23 ¹⁵ Behr's First Priority Claims are not subject to the
24 removal exception of Section 1452(a) since Behr is not a
25 "governmental unit". Nevertheless, as discussed in Section IV(D),
those particular claims should be equitably remanded.

26 ¹⁶ As discussed previously at footnote 14, the Plan Claims
27 are not claims seeking to enforce the police or regulatory powers
28 of the AG and CCSF, since conduct occurring in the context of
proposing and confirming a plan of reorganization is not subject
to a state's regulatory power.

1 focused on whether as a matter of policy there should or should
2 not be an exception to the automatic stay. Where the government
3 acts like a creditor, it is stayed just like other creditors.
4 When it is enforcing law, dealing with regulatory and law
5 enforcement matters, the automatic stay does not stand in the way.
6 But whether the automatic stay does or does not apply has little
7 to do with whether actions -- stayed or not -- may be removed to
8 the bankruptcy court. Nothing suggests that automatic stay
9 considerations should inform the court's decision under Section
10 1452.¹⁷

11 Corporation also contends that 28 U.S.C. § 1441 ("Section
12 1441") -- a statute governing removals generally without a police
13 or regulatory power exception -- is available as an alternative
14 means to remove the AG Action and the CCSF Action to the
15 bankruptcy court, citing Things Remembered, Inc. v. Petrarca, 516
16 U.S. 124 (1995). The court disagrees for several reasons.
17 First, and most importantly, Section 1441 states that "[e]xcept as
18 otherwise expressly provided by Act of Congress," any civil action
19 over which federal district courts have original jurisdiction may
20 be removed to federal district court. Section 1452(a) "otherwise
21

22 ¹⁷ In any event, as noted previously, the California Supreme
23 Court has determined that a governmental unit's action to enforce
24 Section 17200 does serve public policy. Moreover, in United
25 States v. Klein (In re Chapman), 264 B.R. 565, 571 (9th Cir. BAP
26 2001), BAP noted that -- under the 1998 revisions to 11 U.S.C. §
27 362 -- a governmental action to obtain a money judgment is not
28 stayed, but that any action to enforce the money judgment is. In
light of the 1998 revisions, the "pecuniary interest" test may
have lost some of its relevance. Nonetheless, to the extent AG
and CCSF seek to punish Corporation for purported violations and
to deter similar conduct in the future, their actions satisfy the
"pecuniary interest" test. Id. at 570; First Alliance, 263 B.R.
at 108-09.

1 expressly provide[s]" that state police power actions related to a
2 bankruptcy case are not removable. Under the express exception of
3 Section 1441, then, the First Priority Claims are not removable.

4 Second, Section 1452 is more specific than the general
5 provisions of Section 1441. As such, Section 1452 takes
6 precedence over Section 1441. Neary v. Padilla (In re Padilla),
7 222 F.3d 1184, 1192 (9th Cir. 2000) ("Statutory construction
8 canons require that '[w]here both a specific and a general statute
9 address the same subject matter, the specific one takes precedence
10 regardless of the sequence of the enactment, and must be applied
11 first.'"). Third, Things Remembered is distinguishable because it
12 does not address the specific provision of Section 1452(a)
13 excepting police power actions from removal; rather, it deals with
14 the applicability of a statute limiting appellate review to remand
15 orders made in suits removed under Section 1452 and Section 1441.

16 Corporation also contends that the First Priority Claims are
17 removable because only Debtor has standing to prosecute such
18 claims. The court disagrees. The First Priority Claims fall
19 within the ambit of Section 17200. Under the express terms of
20 Cal. Bus & Prof. Code § 17204, civil actions to enforce the Unfair
21 Business Practices Act (e.g., Section 17200) may be brought by
22 "any person acting for the interests of itself, its members, or
23 the general public"). Therefore, the Section 17200 claims do not
24 belong exclusively to Debtor or its creditors, and may be
25 remanded.¹⁸

26
27 ¹⁸ This court expresses no opinion on whether Debtor could
28 prosecute a Section 17200 action against Corporation or its
officers and directors.

1 Corporation further asserts that this court should retain the
2 First Priority Claims because they are related to the bankruptcy
3 case and because the court has supplemental jurisdiction over them
4 under 28 U.S.C. § 1367 and 1441(c). The court dismisses
5 Corporation's "related to" jurisdiction arguments as irrelevant.
6 Assuming arguendo that the First Priority Claims are related to
7 the bankruptcy case (however tangentially, inasmuch as Debtor is
8 not asserting the claims and the claims are not being asserted
9 against Debtor), such claims cannot be removed here under Section
10 1452(a).¹⁹ Congress did not create an exception (for related
11 matters) to the exception to the bankruptcy removal statute
12 discussed, *supra*.

13 In addition, the court will not exercise supplemental
14 jurisdiction over the First Priority Claims even though it is
15 retaining jurisdiction over the Plan Claims and (as discussed
16 below) over CCSF's conversion and unjust enrichment claims and
17 Behr's Fraudulent Transfer Claim and Bulk Sales Claim. Pursuant
18 to 28 U.S.C. § 1367 ("Section 1367"), in any civil action where a
19 district has original jurisdiction, "except . . . as expressly
20 provided by Federal statute" the district court "shall have
21 supplemental jurisdiction over all other claims that are so
22 related to claims in the action within such original jurisdiction
23 that they form part of the same case or controversy . . ." 28
24 U.S.C. § 1367(a). Section 1367(c) notes, however, that the court

26 ¹⁹ If AG had brought these claims here initially, the court
27 may have had "related to" jurisdiction to the extent any funds
28 recovered by AG would flow to the estate. AG brought the First
Priority Claims in state court and to the extent they are "police
power" claims, they simply cannot be removed to this court.

1 may decline to exercise supplemental jurisdiction over a claim if
2 "the claim substantially predominates over the claim" over which
3 the court has original jurisdiction or if "in exceptional
4 circumstances, there are other compelling reasons for declining
5 jurisdiction." 28 U.S.C. § 1367(c)(2) and (4).

6 In this case, supplemental jurisdiction is not required under
7 Section 1367(a) because Section 1452(a) "expressly provide[s]
8 otherwise" by preventing removal of the First Priority Claims.
9 See Estate of Tabas, 879 F.Supp. 464, 467 (E.D. Penn. 1995)
10 (Section 1367 "does not allow a party to remove an otherwise
11 unremovable action to federal court for consolidation with a
12 related federal claim"). In addition, Section 1367(a) is
13 inapplicable because the Plan Claims and the First Priority Claims
14 do not form the same case or controversy; they do not arise from a
15 common factual nucleus. Instead, they are claims based on
16 distinct and easily divisible pre-petition and post-petition
17 conduct.

18 Nonetheless, even if Section 1367(a) were applicable, the
19 court would decline to exercise jurisdiction because the First
20 Priority Claims predominate over the Plan Claims in the AG
21 Complaint and the Behr Complaint.²⁰ More importantly, another
22 compelling reason exists for this court to decline supplemental
23 jurisdiction: the First Priority Claims constitute non-removable
24 police power claims and Section 1367 should not be used to

26 ²⁰ In the Behr Action the First Priority Claims also
27 predominate over the Fraudulent Transfer Claim and Bulk Sales
28 Claim (which, as discussed later, Behr does not have standing to
prosecute). The First Priority Claims also predominate over
CCSF's conversion and unjust enrichment claims.

1 bootstrap nonremovable claims to related federal claims. Tabas,
2 879 F.Supp. at 467.

3
4 D. Behr's Section 17200 Claims Should Be Remanded Under 28
5 U.S.C. Section 1452(a)

6 As a private citizen, Behr cannot assert the "police power"
7 exception to removal available to "governmental units" under
8 Section 1452(a). Nonetheless, her "First Priority Claims" asserted
9 under Section 17200 are virtually identical to the Section 17200
10 First Priority Claims of AG and CCSF. The latter claims, which
11 involve identical factual issues and similar legal issues as
12 Behr's First Priority Claims, are being remanded under Section
13 1452(a). Therefore, under the doctrine of equitable remand set
14 forth in Section 1452(b), grounds exist to remand Behr's First
15 Priority Claims. Such a remand avoids similar litigation in
16 multiple fora²¹ and promotes the goals of judicial efficiency.

17 E. Behr's Fraudulent Transfer Claim And Bulk Sales Claim
18 Belong To Estate And Should Not Be Remanded

19 Because (as discussed below), Behr lacks standing to assert
20 her Fraudulent Transfer Claim and her Bulk Sales Claim, those
21 particular claims should not be remanded. Such claims belong to
22 the estate of Debtor and fall within this court's core
23 jurisdiction.

24
25 ²¹ Behr's First Priority Claims will be remanded back to the
26 Superior Court of the County of Santa Clara, while the First
27 Priority Claims of AG and CCSF will be remanded back to the
28 Superior Court of the County of San Francisco. Upon remand, to
facilitate the interests of judicial economy, consolidation of
these actions appears appropriate but that is for the state courts
to consider.

1 Absent court approval, only a trustee or debtor in possession
2 has standing to assert a fraudulent transfer action. American
3 National Bank of Austin v. MortgageAmerica Corp. (In re
4 MortgageAmerica Corp.), 714 F.2d 1266 (5th Cir. 1983) (creditor's
5 cause of action under the Texas Fraudulent Transfers Act passed to
6 trustee, who is charged with prosecuting on behalf of all
7 creditors and shareholders); AP Industries, Inc. v. SN Phelps &
8 Co. (In re AP Industries, Inc.), 117 B.R. 789, 800 (Bankr.
9 S.D.N.Y. 1990) (holding that initiation of state law fraudulent
10 transfer action violated the automatic stay; court sanctioned
11 creditor) ("intercession of a bankruptcy petition vests standing
12 in a trustee or debtor-in-possession to prosecute an action for
13 recovery of a fraudulent conveyance ... 'It is axiomatic that a
14 duly qualified trustee in bankruptcy represents the estate and is
15 the only proper party to maintain any action under Code § 544(b)
16 ... and that the creditors of the estate have no right to proceed
17 independently in their own names ...'").

18 The Fifth Circuit explained why a trustee or debtor-in-
19 possession has the sole standing to pursue fraudulent transfer
20 actions:

21 The "strong arm" provision of the current Code, 11
22 U.S.C. § 544, allows the bankruptcy trustee to step into
23 the shoes of a creditor for the purpose of asserting
24 causes of action under state fraudulent conveyance acts
25 for the benefit of all creditors, not just those who win
26 a race to judgment. [Citation omitted.] A trustee acting
27 under section 544 "acts as a representative of
28 creditors," [citation omitted] and any property
recovered is returned to "the estate for the eventual
benefit of all creditors." [Citations omitted.] The
Supreme Court has, in fact, expressly noted that section
"541(a)(1) is intended to include in the estate any
property made available to the estate by other
provisions of the Bankruptcy Code," which would include
property made available through section 544. [Citation

1 omitted.] Actions for the recovery of the debtor's
2 property by individual creditors under state fraudulent
3 conveyance laws would interfere with this estate and
4 with the equitable distribution scheme dependent upon
5 it, and are therefore appropriately stayed under section
6 362(a)(3). Any other result would produce near anarchy
7 where the only discernible organizing principle would be
8 first-come-first-served. Even without the Bankruptcy
9 Code and the policies that support it, we would be
10 reluctant to elevate such a principle to a rule of law.

11 MortgageAmerica, 714 F.2d at 1275-76 (emphasis added).

12 Similarly, the creditors of Debtor who had standing to
13 prosecute claims under any bulk sales law prior to the petition
14 date no longer enjoy such standing. AP Industries, 117 B.R. at
15 800 (bankruptcy vests power to prosecute such claims on trustee or
16 debtor in possession; after bankruptcy, judgment creditor's
17 "status, as a party with standing to void transfers as fraudulent
18 conveyances or as defective bulk sales, was impaired by the
19 superseding bankruptcy cases.") (citations and quotations
20 omitted).

21 California Commercial Code Section 6107 entitles "claimants"
22 to sue for violation of the Bulk Sales Law. The transferor (here
23 Debtor, according to Behr) has no such right. See Cal. Comm. Code
24 § 6107(a) and (b) and UCC Comment, ¶ 1. Under 11 U.S.C. § 544(b),
25 the debtor in possession would have such a right in place of
26 aggrieved creditors.

27 Since the estate is the only party with standing to assert
28 the Fraudulent Transfer Claim and the Bulk Sales Claim, Behr
cannot pursue these claims. By initiating such actions Behr
violated the automatic stay. Moreover, since these claims belong
to the estate, they fall within this court's core jurisdiction

1 under 28 U.S.C. § 157(H) and (F). Consequently, the court will
2 not remand these claims.

3 F. CCSF's Conversion And Unjust Enrichment Claims Belong To
4 Estate And Should Not Be Remanded

5 As noted previously, CCSF's Complaint indicates that at the
6 time of the purported conversions, the money being converted was
7 owned and held by Debtor. As such, the claim of conversion
8 belongs to Debtor's estate and CCSF lacks standing to assert it.
9 Kremen v. Cohen, 99 F.Supp.2d 1168, 1172 (N.D. Cal. 2000)
10 (elements of conversion require plaintiff to have "ownership or
11 right to possession of the property at the time of the
12 conversion"); Jenkins v. Homer (In re Homer), 45 B.R. 15, 25
13 (debtors' claim for conversion became property of estate and
14 assertable only by trustee). CCSF's unjust enrichment claim is
15 too similar to be treated any differently. For the same reasons
16 that Behr lacks standing to pursue her Fraudulent Transfer Claim
17 and her Bulk Transfer Claim, CCSF lacks standing to pursue the
18 conversion claim and the unjust enrichment claim, which belong to
19 the estate. Therefore, those claims fall within this court's core
20 jurisdiction and will not be remanded.

21 V. CONCLUSION

22 An order remanding the third cause of action of the CCSF
23 Complaint is being issued concurrently with this Memorandum
24 Decision.

25 In order to avoid confusion in both this court and in the
26 state courts, no later than July 14, 2002, AG and Behr should
27 file and serve amended complaints, either deleting their Plan
28

1 Claims or separating the Plan Claims and the First Priority Claims
2 into distinct causes of action.²²

3 The court will hold a status conference on July 22, 2002, at
4 9:30 a.m. with respect to the non-remanded claims and
5 Corporation's pending motions to dismiss. At that conference the
6 court will set a briefing schedule for those motions; nothing
7 pertaining to them should be filed earlier. The court will also
8 discuss with counsel whether the Plan Claims should be
9 consolidated with any objections to confirmation of the Plan to be
10 filed by AG, CCSF or Behr.

11 At the same conference the court will determine whether the
12 AG Complaint and the Behr Complaint have been properly amended
13 consistent with this Memorandum Decision. If so, the court will
14 then issue remand orders in the AG Action and the Behr Action.
15 Counsel for Corporation should be prepared to comment on the
16 amended complaints at the status conference.

17 Dated: June 14, 2002

18 _____
19 Dennis Montali
20 United States Bankruptcy Judge
21
22
23

24 _____
25 ²² In other words, the AG's Plan Claims set forth in
26 paragraphs 99-107 and 113-115 of the AG Complaint should either be
27 deleted or be placed into a separate cause of action alleging
28 post-petition events that purportedly violate Section 17200.
Similarly, Behr's Plan Claims set forth in paragraph 121 of Behr's
Complaint should either be deleted or be placed into a separate
cause of action alleging post-petition events that purportedly
violate Section 17200.